STATE OF MICHIGAN

COURT OF APPEALS

ROBERSON BUILDERS, INC.,

Plaintiff/Counter-Defendant-Appellee,

v

JAMES LARSON,

Defendant/Counter-Plaintiff-Appellant.

UNPUBLISHED
September 19, 2006

No. 260039
Midland Circuit Court
LC No. 03-005718-CZ

Before: Sawyer, P.J., and Fitzgerald and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right from the judgment in his favor following a jury trial. Defendant appeals the portion of the judgment allowing plaintiff a setoff against the damages awarded to defendant for his breach of contract claim. Defendant also appeals the finding of no cause of action with regard to his claim under the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.* We affirm in part, reverse in part, and remand for further proceedings.

Plaintiff is a residential building contractor who was hired by defendant to complete an extensive remodeling project on his vacation home in Cheboygan, which involved re-roofing and the installation of siding. Defendant was not happy with the work, in particular the siding, and withheld payment of his final bill. Plaintiff then sued defendant for the remaining balance on the contract plus extra charges incurred during the course of the project. Defendant filed a counterclaim, alleging breach of contract, breach of express and implied warranty, and a violation of the MCPA. Prior to trial, however, it was discovered that plaintiff was unlicensed and therefore barred by statute from suing to recover for compensation. The trial court, however, permitted plaintiff to present evidence that he was entitled to recover payment up to the balance of the contract.

Using a special verdict form, the jury awarded defendant $24,048 in damages for the siding, roof, and fascia, based on its finding that plaintiff "materially breach[ed] the construction contract by failing to perform the work skillfully, carefully, diligently, and in a workmanlike manner." It also awarded defendant $1,416 for certain uncompleted tasks. It further found, however, that defendant received services in addition to those provided for in the contract and awarded plaintiff $6,378 for those "extras," which was subtracted from the damages awarded to defendant. The jury also found that plaintiff's conduct did not constitute a failure to "provide the

promised benefit," and therefore no judgment was entered against plaintiff on defendant's claim under the MCPA.

Defendant first argues that the trial court erred by permitting plaintiff to assert a claim for a setoff against any damages awarded to defendant. We agree. This issue involves statutory interpretation, which presents a question of law that is reviewed de novo. *Morales v Auto-Owners Ins Co* (*After Remand*), 469 Mich 487, 490; 672 NW2d 849 (2003).

Initially, we reject plaintiff's argument that defendant failed to preserve this issue for review because he did not object to the jury instructions. This issue was raised by defendant in a written motion to the trial court and during the course of the trial, and the trial court indicated on two occasions that it was denying defendant's motion. Once the trial court has made an adverse ruling, a party is not required to make continued, futile objections in order to preserve the issue for review. *Miller v Hensley*, 244 Mich App 528, 532 n 2; 624 NW2d 582 (2001).

Under MCL 339.2412, a residential builder or contractor cannot "bring or maintain an action in a court of this state for the collection of compensation for the performance of an act or contract for which a license is required by this article without alleging and proving that the person was licensed under this article during the performance of the act or contract." The parties do not dispute that, as an unlicensed contractor, plaintiff was barred from maintaining its original action to recover compensation from defendant. At issue is whether the trial court erred when it allowed plaintiff to present evidence that it was entitled to recover the unpaid balance of the contract, as well as payment for extra work performed that was not included in the original contract.

The trial court based its ruling on *Kirkendall v Heckinger*, 403 Mich 371; 269 NW2d 184 (1978), which the trial court said permitted a non-licensed builder to use unpaid costs "defensively." In *Kirdendall*, the defendant, an unlicensed contractor, was allowed to recover reasonable expenditures as a condition of awarding equitable relief to the plaintiff. *Id.* at 374-375. In *Stokes v Millen Roofing Co*, 466 Mich 660; 649 NW2d 371 (2002), however, the Court made clear that *Kirkendall* applies only to cases in which an equitable remedy is required. *Stokes* held that, as a general rule, an unlicensed builder cannot seek compensation from a homeowner through equitable relief because doing so would circumvent the express statutory prohibition contained in MCL 339.2412. See *Stokes*, *supra* at 675 (Markman, J., concurring).

According to the *Stokes* Court, the only reason for entertaining equity in *Kirkendall* was because the original conveyance to the defendant was valid and clouded title, and therefore, even after dismissal of his counterclaim, the Court had to find an equitable remedy. *Stokes*, *supra* at 671. In this case, defendant was not seeking equitable relief, and no equitable remedy was required. See *id.* Therefore, we conclude that the trial court erred by allowing plaintiff to receive a setoff, and the $6,378 for extras should not have been deducted from the award of damages to defendant.

Defendant next argues that the trial court erred by submitting to the jury the question of whether plaintiff's conduct violated the MCPA. We agree. The applicability of a statute is a question of law that is reviewed de novo. *Klinke v Mitsubishi Motors Corp*, 219 Mich App 500, 506; 556 NW2d 528 (1996).

The MCPA prohibits the use of unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce. MCL 445.903(1). "Trade or commerce" is defined as "the conduct of a business providing goods, property, or service primarily for personal, family or household purposes." MCL 445.902(d). At issue in this case is the provision of the MCPA that prohibits "[g]ross discrepancies between the oral representations of the seller and the written agreement covering the same transaction or failure of the other party to the transaction to provide the promised benefits." MCL 445.903(1)(y). A party who suffers a violation of the MCPA is entitled to reasonable attorney fees. MCL 445.911(2).

The special verdict form asked the jury whether plaintiff's conduct "constituted a 'failure of the other party to the transaction to provide the promised benefit.' " Defendant argues that this question should not have been submitted to the jury because, if the jury were to find (as it did) that plaintiff's conduct breached the contract's implied warranty of good workmanship, as a matter of law that would constitute a violation of the MCPA.

In support, defendant relies on *Mikos v Chrysler Corp*, 158 Mich App 781; 404 NW2d 783 (1987), in which this Court held that a breach of an implied warranty of merchantability constitutes a violation of the MCPA. *Id.* at 782-783. According to the *Mikos* Court, an implied warranty was a benefit promised by law, and from the consumer's standpoint "it is just as much a promised benefit as if the merchant itself made the promise." *Id.* at 784. Accordingly, it concluded that breach of an implied warranty constitutes a " 'failure to provide the promised benefits' " under the MCPA, and that "[a] plaintiff who establishes breach of an implied warranty of merchantability is therefore entitled to attorney fees under the Consumer Protection Act." *Id.* at 784-785.

The trial court distinguished *Mikos* on the basis that the present case involved an obligation to perform "workmanlike work in a construction context" rather than a warranty for a defined merchantable good. There is no language in *Mikos*, however, that limits its holding in this respect; it framed the question before it as whether "implied warranties" constitute "promised benefits" under the MCPA. *Mikos, supra* at 782.

Further, at least in the context of the special verdict form in this case, the question of whether plaintiff's conduct constituted a failure to provide the "promised benefit" was one of law, rather than one of fact, and therefore it should not have been submitted to the jury. See *McClelland v Scholz*, 366 Mich 423, 426; 115 NW2d 120 (1962) (finding error requiring reversal in the submission to the jury of questions of law in a special verdict form); *Krupp PM Engineering, Inc v Honeywell, Inc*, 209 Mich App 104, 106-108; 530 NW2d 146 (1995) (concluding that the trial court erred by submitting the question whether the warranty language at issue was unconscionable to the jury because it was a question of law but finding the error harmless under the circumstances).

Finally, plaintiff argues that the MCPA should not apply at all in this case because the residential building industry is regulated by statute, and, under *Smith v Globe Life Ins Co*, 460

Mich 446; 597 NW2d 28 (1999), is therefore outside the scope of the MCPA.[1] Whether the MCPA applies to licensed residential builders is a question currently pending before our Supreme Court, which granted leave to appeal this Court's decision in *Hartman & Eichhorn Bldg Co, Inc v Dailey*, 266 Mich App 545; 701 NW2d 749 (2005), lv gtd 474 Mich 1132; 712 NW2d 724 (2006).

The trial court was correct that this issue is currently controlled by *Forton v Laszar*, 239 Mich App 711, 715; 609 NW2d 850 (2000), which held that "residential builders are subject to claims of unfair or deceptive trade practices under the MCPA." Further, it is undisputed that plaintiff was not licensed at the time it performed the work in question. Therefore, the transaction at issue was not authorized by statute as it would be when a licensed professional is engaged in an activity that is specifically authorized under its license. See *Smith, supra* at 464-465. We therefore conclude that the MCPA was applicable in this case and that the question of whether plaintiff's conduct constituted a failure to provide a promised benefit was erroneously submitted to the jury. Pursuant to *Mikos, supra* at 785, the appropriate remedy is to remand for a determination of attorney fees due to defendant under the MCPA.

Affirmed in part, reversed in part, and remanded to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell

[1] Pursuant to MCL 445.904(1)(a), the MCPA "does not apply to . . . [a] transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state."